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In The

Supreme Court of the United States

October Term, 1964

No. 777

RAYMOND W. FLEMING,

Petitioner,

vs.

MICHAEL S. WOLKE,
Sheriff of Milwaukee County,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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STATEMENT OF THE CASE

The petitioner's statement of the case is substantially correct, except for the portion appearing at page 5 of the petition and reading as follows:

> "He actually had been deceived by the subpoena to believe that he was a witness on behalf of the State. Under the circumstances, he had been given no reason to even consider whether he should consult with counsel."

No such allegations appear in the record. Issue was joined on demurrer to traverse. (R. 47.)

REASONS FOR DENYING WRIT

Petitioner asks that this Court declare unconstitutional a statute providing for a "John Doe" examination or investigation by extending the grand jury requirement of the Fifth Amendment to the states.

This contention is being raised, for the first time in the proceeding, in this Court. No reference to it appears anywhere in the record, in the decision of the lower court, or in the decision of the Wisconsin Supreme Court. If the state courts below do not appear to have addressed themselves to a particular issue, it will not be considered by this Court. *Michigan National Bank v. Robertson,* (1963) 372 U. S. 591, 83 S. Ct. 914, 9 L. ed. 2d 961. On this ground alone, the petition should be denied.

We submit that the petitioner confuses the Wisconsin "John Doe" statute with the Wisconsin Statutes requiring a preliminary examination in a felony charge. (Respondent's Appendix A.) Thus, he refers to *Hurtado v. State of California,* (1884) 110 U. S. 516, 538, 4 S. Ct. 111, 292, 28 L. ed. 234 and the discussion therein to support his comment at pages 10 and 11 of his petition with respect to "the abuses arising out of the substitutions for the Grand Jury such as the 'John Doe' in the case at bar."

Hurtado did not involve any question with reference to a John Doe proceeding. The Court there dealt with the subject of a *preliminary examination* as a permissible state

substitute for a grand jury in a state proceeding. The petitioner here may not, at this time, properly challenge the right of the state to provide for a preliminary examination in lieu of a grand jury proceeding, since he has not yet been required to undergo such examination; and he is not actually making such a challenge. Hence, his argument that he should be entitled to the grand jury proceeding rather than a "John Doe" examination is not apropos, and is without merit.

The case of *Malloy v. Hogan,* (1964) 37 U. S. 1, 84 S. Ct. 1489, 12 L. ed. 2d 653, cited at page 11 of the petition, does not support the petitioner's contentions. In fact, *Malloy* actually involved a "John Doe" investigation by a referee, and the Court did not see fit to express any disapproval of such procedure. The case held only that the provisions of the Fifth Amendment relating to self-incrimination are applicable to such a proceeding, and that when the privilege against self-incrimination is raised, federal standards are applicable thereto.

Petitioner's difficulty is that nowhere in his petition for writ of habeas corpus or in his traverse of the return—*his own record, prepared by his own counsel*—does he allege that he was compelled to testify in violation of the prohibition against compulsory self-incrimination. He does not allege that he even claimed the privilege.

The fact that the petitioner was subpoenaed to testify in the "John Doe" proceeding does not raise any inference of violation of his rights. An appearance of a witness before a grand jury in response to a subpoena does not constitute a violation of the witness' constitutional right

against self-incrimination *even though the witness is later indicted by the same grand jury;* and although the witness has a right to decline to answer, the mere summoning of him before the grand jury does not afford any basis for assuming that his constitutional privilege against self-incrimination will be impaired. *United States v. Wortman,* (D. C. Ill. 1960) 26 F. R. D. 183.

The constitutional privilege against self-incrimination is not automatic; it must be invoked by the witness; and by failing to invoke the privilege, he waives it. *United States v. Holovachka,* (7th Cir., 1963) 314 Fed. 2d 345, cert. den. 374 U. S. 809, 83 S. Ct. 1695; rehearing den. 374 U. S. 859, 83 S. Ct. 1869.

We repeat that the petitioner's own record is absolutely barren of any allegation that he claimed the privilege or that it was denied.

The petitioner contends that because he was questioned "in the absence of counsel for the petitioner" (R. 21), the proceeding was illegal, and cites *Escobedo v. Illinois,* (1964) 378 U. S. 478, 84 S. Ct. 1758, 12 L. ed. 2d 977 in support. *Escobedo,* however, is of no help in that regard. That case involved a petitioner who had been arrested, and while being subsequently interrogated, *had asked for his lawyer and had been refused.* The Court stated, explicitly:

> "Nothing we have said today affects the powers of the police to investigate 'an unsolved crime,' Spano v. New York, 360 US 315, 327, 3 L ed 2d 1265, 1274, 79 S Ct 1202 (Stewart, J., concurring), by gathering information from witnesses and by other 'proper investigative efforts.' Haynes v. Washington, 373 US

> 503, 519, 10 L ed 2d 513, 524, 83 S Ct 1336. *We hold only* that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." (Emphasis supplied.)

Again, petitioner's own record is completely devoid of any allegation that during the proceeding, he had asked to consult with his counsel and had been refused that right. Very carefully, he alleges only, as above mentioned, that he was questioned "in the absence of counsel." Mere absence of counsel (totally unexplained by the petitioner's record) is not enough; and *Escobedo* does not require that such interrogation must take place in counsel's presence at all events. The case requires only that if the person being interrogated requests that he be allowed to consult with counsel, the request must be granted.

We find somewhat strange the petitioner's contention that state substitutes for a grand jury should be held unconstitutional while, at the same time, he would eliminate the grand jury also. This would be the effect if his citation of the Manual for Courts Martial, United States, 1951, article 34, p. 45 (pages 17 and 18 of the petition) were to be followed. If a grand jury should be required to conform to military investigational procedures, (which do not culminate in a jury trial presided over by a judge learned in the law), of what use would a grand jury be?

The petitioner's contention that the magistrate conducting a "John Doe" examination has unlimited discre-

tion is not correct. In *State ex rel. Niedziejko v. Coffey*, (1964) 22 Wis. 2d 392, 126 N. W. 2d 96, the court stated:

> "The presumption is that the magistrate has not abused his discretion both as to duration and scope of the proceeding. This presumption can be overcome only by specific allegation which the magistrate may contest. If the facts then show that the magistrate has extended the proceeding in duration or scope beyond the reasonable intendment of the statute, or has otherwise improperly conducted the proceeding and intends to persist, he can be restrained by writ of prohibition for abuse of discretion."

To bring this matter into focus, we must observe that if the petitioner must stand trial, it will be upon an information filed after he has had a preliminary examination by a magistrate, rather than upon an indictment by a layman grand jury. At that preliminary, he will have the right to counsel (which he would not have before a grand jury), the right of cross-examination (not afforded before a grand jury), and the right of inspection of the record and exhibits (not allowed before a grand jury). The purpose of a preliminary examination under Wisconsin law is to prevent hasty, malicious, improvident and oppressive prosecutions, to protect the accused from open and public accusation of crime, to avoid, both for the accused and the public, the expense of a public trial when unnecessary, to save the defendant from unmerited humiliation or anxiety, and to discover whether a real basis for a criminal prosecution exists. *Thies v. State*, (1922) 178 Wis. 98, 189 N. W. 539. And in felony cases (as here), the statutes contemplate that the examining magistrate shall be someone

other than the judge of the court trying the offense. *State v. Solomon,* (1914) 158 Wis. 146, 147 N. W. 640.

In contrast, the power and duty of a grand jury to investigate is original and complete, susceptible of being exercised on its own motion *and on such knowledge as it may derive from any source which it may deem proper,* and is not, therefore, dependent for its exercise on the approval or disapproval of the court. *United States v. Thompson,* (1920) 251 U. S. 407, 40 S. Ct. 289, 64 L. ed. 333. And an investigation by a federal grand jury need not be preceded by any definition whatever of crimes to be investigated or persons against whom an accusation is sought. *United States v. Neff,* (2d Cir., 1954) 212 F. 2d 297.

As additional safeguards, it is of importance to note that in a Wisconsin "John Doe" proceeding, the immunity statute, sec. 325.34 applies. (Respondent's Appendix A.) As construed in *State ex rel. Jackson v. Coffey,* (1963) 18 Wis. 2d 529, 118 N. W. 2d 930, the section covers not only a "John Doe" examination, but extends to preliminary examinations, and grand jury proceedings as well as a trial itself, and the grant of immunity (if asked for by the prosecution) must be in open court where a record thereof is made.

As of today, an immunity grant is fortified by *Murphy v. Waterfront Commission,* (1964) 368 U. S. 32, 84 S. Ct. 1594, 12 L. ed. 2d 678. This Court there held that, contrary to what had been the law on the subject, a grant of immunity by a state court extends not only to all other states, but the federal government as well. Hence, in a "John Doe" proceeding, and in a preliminary examination, the

right of a witness against self-incrimination is as adequately protected as in a grand jury proceeding—perhaps even more so, since the privilege is raised before a magistrate in such judicial examinations.

Consequently, the rights of an accused are in fact more adequately protected by the system of preliminary examination after investigation and charge than by a grand jury proceeding. The *Hurtado* decision has stood the test of time in that respect and should not be overruled as petitioner asserts.

In *Goyer v. State of Wisconsin*, (1965) — Wis. 2d —, — N. W. 2d —, not yet reported, the Wisconsin Supreme Court, in a cogent opinion, refused to declare unconstitutional the method of trial upon an information rather than upon a presentment or indictment by a grand jury. The concurring opinion of Currie, C. J., is an especially apt discussion of the matter. Chief Justice Currie there observes that prior to the ratification of the Fourteenth Amendment, a number of states which later ratified that Amendment had provisions, constitutional or statutory, that did not require presentment or indictment in all felonies; and that in Wisconsin, which did have a constitutional requirement of presentment or indictment prior to its ratification of the Amendment, the requirement was eliminated from the state constitution 3 years after ratification by Wisconsin of the Amendment, demonstrating the understanding of the people that the Fourteenth Amendment did not require the re-imposition of presentment or indictment formerly provided. Chief Justice Currie continues:

"Over the years there has been a rather steady movement away from grand jury indictments and substituting in its place the initiation of criminal prosecutions by complaint or information. Even England in 1933 abolished the grand jury. While in 1791, when the first ten Amendments to the United States Constitution containing the Bill of Rights became effective, presentment or indictment by grand jury may have been implicit in the concept of ordered liberty, it had ceased to be so regarded by many peoples when the Fourteenth Amendment was enacted and ratified. Today there are at least 21 states, in which an information is available as a substitute for a grand jury in all criminal prosecutions. United States District Judge JOHN W. OLIVER recently pointed out these pertinent facts showing the trend of opposition to the grand jury: William Howard Taft in 1915 testified against the grand jury before the New York State Constitutional Convention; in 1920 the American Judicature Society joined the ranks of those favoring complete abolition; in 1928 the American Law Institute recommended that all criminal prosecutions be commenced by information alone; and the Wickersham Commission's report in 1931 to President Hoover recommended that grand juries be abolished."

CONCLUSIONS

The petitioner does not allege anything in his own record to indicate that any of his constitutional rights have in any manner been violated. As the Wisconsin Supreme Court has clearly stated in this case, he will have ample and adequate opportunity to show, if he can, that there has been a violation of his rights, and he may do so before trial.

But on the record before this Court, and under the decisions herein cited, no such violations exist.

In consequence, the petition for writ of certiorari should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX A

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WISCONSIN STATUTES INVOLVED

"954.04 Prisoner taken before magistrate. Except as provided otherwise in s. 954.034, every person arrested upon a warrant shall be taken before the magistrate before whom it is returnable or if he is unable to attend before another magistrate of the same county. In cases not triable before the magistrate, the defendant shall not be required to plead."

"954.05 Adjournments of hearing. (1) The magistrate may adjourn the examination from time to time, but not exceeding 10 days at one time without the consent of the defendant, and to any place in his county, and the defendant shall be committed in the meantime unless he is bailed.

"(2) If he is not bailed, the magistrate shall order him committed to await examination on a day named in the commitment. On the appointed day he shall be brought before the magistrate."

"954.06 Forfeiture of bail. If the defendant does not appear for his preliminary examination as required by the bail bond, the magistrate shall record the default and shall certify the bond with the record of default to the circuit or county court; and like proceedings shall be had therein as upon a breach of a bond for appearance before that court. The magistrate may reissue the warrant or capias or issue another warrant for the arrest of the defendant."

"954.08 Preliminary examination; separation of witnesses; transfer of examination. (1) WITNESSES EXAMINED AND CROSS-EXAMINED. As soon as may be, the magistrate shall swear and examine or

permit the district attorney to examine the witnesses for the state, in the presence of the defendant, in relation to the crime charged in the complaint; and they may be cross-examined. Then the witnesses for the defendant shall be sworn and examined and may be cross-examined. The defendant may be assisted by counsel.

"(2) SEPARATION OF WITNESSES. During the examination, the magistrate may exclude from the place of examination all witnesses until they are called to testify; and he may also direct that persons who are expected to be called as witnesses be kept separate until called; and he may prevent them from communicating with one another until they have been examined.

"(3) TRANSFER OF EXAMINATION. If it is inconvenient or impractical for the magistrate before whom the defendant is first brought to proceed with the examination within 10 days, the magistrate may transmit the case to another qualified magistrate of the county and he shall proceed with the examination."

"954.09 Change of venue. If a defendant files an affidavit before the examination begins that he believes that the magistrate will not decide impartially in the matter, the magistrate shall transmit the case to the nearest magistrate qualified to conduct the examination, except that if the magistrate is a judge of a multi-branch court, then the matter shall be referred to the clerk of said court who shall, in accordance with the rules of court, assign said matter to another branch of that court to attend and conduct the examination in said matter. If the crime is bailable, and sufficient bail is given, the removing magistrate shall bail the defendant for his later appearance before the magistrate to whom the case is transmitted. No case shall be re-

moved after a second adjournment, and only one removal shall be allowed. No such affidavit shall name more than one county judge. If there are 2 or more defendants and less than all join in the affidavit of prejudice then the examining magistrate shall be changed as to all the defendants."

"954.10 Exclusion of public. If the defendant is accused of a crime against chastity or morality or decency, the magistrate may exclude from the hearing all persons not officers of the court or otherwise required to attend."

"954.11 Testimony to be written. The testimony shall be written by the magistrate or under his direction."

"954.12 Discharge; when complaint to pay costs. If it appears to the magistrate upon the examination that no crime has been committed or that there was no probable cause for charging the defendant with a crime, he shall be discharged. If the magistrate certifies in his docket that the complaint was malicious and without probable cause, he shall enter judgment against the complainant and in favor of the county for the taxable costs of the proceeding, and thereafter proceedings shall be as provided in s. 960.22."

"954.13 Commitment, trial, bail. (1) If it appears probable that a felony has been committed and that the defendant is probably guilty, he shall be committed to await trial in either county court or circuit court at the discretion of the magistrate, except in counties having a population of 500,000 or more he shall be committed to await trial in the circuit court. If the felony

is bailable by the magistrate and a sufficient bail is offered he shall be released."

"954.17 Examinations returned to court. All examinations and the evidence and bonds taken by a magistrate shall be certified and returned by him within 10 days to the clerk of the court before which the defendant is bound to appear."

"325.34 Incriminating testimony compelled; immunity. Whenever any person shall refuse to testify or to produce books, papers or documents when required to do so in any criminal examination, hearing or prosecution for the reason that the testimony or evidence required of him may tend to criminate him or subject him to a forfeiture or penalty, he may nevertheless be compelled to testify or produce such evidence by order of the court on motion of the district attorney. But no person who testifies or produces evidence in obedience to the command of the court in such case shall be liable to any forfeiture or penalty for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence; but no person shall be exempted from prosecution and punishment for perjury committed in so testifying."

CERTIFICATE OF SERVICE

I, Robert D. Martinson, a member of the Bar of this Court, hereby certify that I have this day served the foregoing Respondent's Brief Opposing Petition for Writ of Certiorari upon the Counsel of Record for the Petitioner herein, by mailing a copy thereof with first class postage prepaid, addressed as follows:

Ray T. McCann
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Dated this 21st day of January, 1965.

ROBERT D. MARTINSON
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